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DATO' PREM KRISHNA SAHGAL v. MUNIANDY NADASAN & ORS

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
SURIYADI HALIM OMAR FCJ
B HASAN LAH FCJ
AZIAH ALI FCJ
JEFFREY TAN FCJ
[CIVIL APPEAL NO: 02(f)-53-08-2016(W)]
14 SEPTEMBER 2017

C

COMPANY LAW: *Fraudulent trading – Intent to defraud – Allegation of – Claim for outstanding debt due and owing to employees of company – Whether managing director of company had intention to cheat or deceive employees – Whether an employee who makes a claim of statutory emolument and contribution entitled to*
D *make claim as creditor – Whether monies claimed by employees valid debt under the law – Whether employees creditors of company – Whether a single act to defraud a creditor sufficient to trigger action for compensation against errant person – Whether managing director of company liable to employees – Elements of s. 304 of the Companies Act 1965 – Whether proved – Right of employee to claim for*
E *outstanding wages and salaries – Companies Act 1965, s. 292(1)(b), (c) and (e)*

WORDS & PHRASES: *'creditor' – Companies Act 1965, s. 304 – Whether includes 'contingent or prospective creditor' – Whether 'prospective creditor' refers to creditor whose claim for debt or right to enforce such claim expected or likely to happen in future – Companies Act 1965, s. 217(b)*

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The first to eighty third respondents ('the employees') worked with the eighty fourth respondent ('CNLT'), a public listed company, while the appellant ('first defendant in the High Court') was at all material times the executive managing director of the said company. On 16 January 2009, the High Court wound up CNLT and appointed joint and several provisional liquidators of
G CNLT. In 2013, the employees filed a suit against nine defendants to claim for arrears of salary and workers' compensation in the total sum of RM2,910,201.78. The employees' cause of action was predicated upon an action for fraudulent trading under s. 304 of the Companies Act 1965 ('the Act') and/or for conspiracy committed by the defendants. It was the
H employees' case that the business of CNLT was carried on from 2006 onwards until it was wound up in January 2009 with intent to defraud creditors of the company, or for a fraudulent purpose. By this action, the employees sought, *inter alia,* the following orders: (i) a declaration that the business of CNLT had been carried on by the defendants with intent to
I defraud the creditors of CNLT, in particular the employees pursuant to s. 304 of the Act; (ii) a declaration that the defendants shall be jointly

and/or severally liable and personally responsible, without any limitation of liability for all of the debts or other liabilities of CNLT; and (iii) an order that the defendants, jointly and/or severally pay the outstanding debt due and owing to the employees by CNLT. In his defence, the appellant maintained that at all material times, he was concerned primarily with the rescue and salvage of CNLT and had no intention to cheat or deceive the employees of monies or benefits lawfully due to them. At the end of the trial, the High Court Judge accordingly held that the business of CNLT was carried on by the appellant with intent to defraud the creditors of CNLT including the employees pursuant to s. 304 of the Act. There was, however, no such declaration granted in respect of the other directors of CNLT. The appellant was held to be personally liable to the employees, and to pay the employees the said sum as claimed. The appellant appealed to the Court of Appeal against the said decision. The appellant's primary contention was that the elements of s. 304 of the Act were not fulfilled as the employees were, *inter alia*, not creditors at the time the alleged fraudulent trading was perpetrated. The Court of Appeal, however, dismissed the appellant's appeal and held that the employees were entitled to the sum prayed for as the liquidators had accepted their proof of debt forms, thereby acceding to and confirming that these monies were due and owing to the employees. In short, the claims of the employees were accepted as valid debts under the law. Hence, the appellant appealed. Leave to appeal was granted by this court on the following question of law: whether an employee who makes a claim of statutory emoluments and contribution was entitled to make a claim as a creditor for the purpose of s. 304(1) of the Act.

Held (dismissing appeal with costs)
Per Hasan Lah FCJ delivering the judgment of the court:

(1) Section 304 of the Act deals with fraudulent trading or carrying on a business with an intention to defraud creditors. A person will not be able to hide behind the corporate veil and avoid liability for the company's debts if he had used the company to perpetrate fraud and the company went into liquidation. The section provides for liability against directors personally on the basis that they carried on business of the company with the intention of defrauding creditors. In order for the employees to succeed in their claim under s. 304 of the Act, the employees need to proof that (a) they were the creditors of CNLT; and (b) after they became creditors of CNLT, the business of the company was carried on by the appellant with intent to defraud them as creditors. (paras 45-49)

(2) The appellant was aware of the claim made by the employees. The appellant even lodged a statement of affairs dated 23 April 2008 and 24 June 2008 after the liquidators were appointed giving outstanding sums due to the employees. Thus, it was incontrovertible that he had the relevant information and knowledge of these claims. During the trial, he did not challenge nor object to the PODFs lodged by the employees. Both the High Court and the Court of Appeal made a concurrent finding of fact that the monies claimed by the employees were valid debt under the law. Having proved that they were entitled to the sum claimed which included the outstanding wages and other statutory emoluments, the employees were therefore the creditors of CNLT. The rights of an employee to claim for outstanding wages and salaries are recognised by s. 292(1)(b), (c) and (e) of the Act. (paras 60-62)

(3) The appellant had contended that neither the appellant nor the other directors of CNLT could be blamed or held liable personally for the employees' claims because provisional liquidators were appointed by the court. However, the provisional liquidators could not be held responsible for the welfare of the employees upon their appointment in May 2008. The retention of the employees' services was a deliberate decision taken by the appellant as managing director. This decision was taken to retain their services when the appellant knew for a fact that CNLT was no longer a going concern and there was no prospect of these employees receiving their remuneration, *albeit* salary or termination benefits. The appellant had instead by this time dishonestly dissipated assets which could have been utilised by the general body of unsecured creditors, including the employees. As such, the provisional liquidators could not be held responsible for not terminating the services of the employees. The employees stood discharged as a consequence of the winding-up order of 16 January 2009 which served as notice of such discharge or termination. (para 68)

(4) The employees alleged that CNLT failed to remit EPF and SOCSO contributions, both employer and employee, despite deducting the requisite employees' contributions. It was, however, the appellant's contention that the monies owed to EPF, SOCSO and IRB were debts owed to the said bodies, and not to the employees. Those monies were deducted from the employees' salary and CNLT held the monies on trust for onward transmission to the relevant bodies. When CNLT failed to remit the monies to the relevant bodies, CNLT became the trustee on the basis of constructive or quistclose trust of the monies with the employees as the beneficiaries. As such, the employees were also entitled to claim the monies back from CNLT as they were part of the employees' salary and belonged to the employees. Since the employees

were entitled to receive those monies, the employees were necessarily creditors of CNLT. As creditors, therefore, they were entitled to bring an action under s. 304 of the Act. (paras 70-72)

(5) The word 'creditor' in s. 304 of the Act must be taken to include 'contingent or prospective creditor' as being used in s. 217(b) of the Act and the word 'prospective creditor' refers to a creditor whose claim for debt or right to enforce such claim is expected or likely to happen in the future. On the facts of this case, the employees became the creditors of CNLT by September 2007 when CNLT failed to remit the employees' statutory contribution for the month of August 2007. (paras 75 & 76)

(6) From the evidence adduced, several allegations made by the employees did in fact occur in or after September 2007: (i) unauthorised payment made out of CNLT's assets during the period when the restraining order dated 26 October 2007 was in place and on 21 January 2008, a payment of RM50,104 was made from CNLT's monies to the appellant; (ii) the issuance of three cash cheques in a total sum of RM160,000 and were encashed notwithstanding that an order for the appointment of provisional liquidators was served on CNLT. From these payments, this amounted to a siphoning out a sum of RM160,000 which would have been available to the unsecured creditors or the employees; (iii) failure of CNLT to remit contributions to EPF and SOCSO and to make payment to IRB despite deductions having been made, which amounted to a deliberate omission, with dishonest intention of channelling those funds out of CNLT in favour of preferred unsecured creditors and shareholders; and (iv) dissipation of assets out of the reach of the provisional liquidators in May 2008. (paras 81-85)

(7) The appellant contended that for a claim under s. 304 of the Act, the statement of claim must specifically identify how the business of the company was carried out with the intent to defraud creditors. This issue was considered and dealt with by the Court of Appeal and it was of the view that it was not necessary to establish a scheme to defraud on the part of the appellant to trigger the invocation of s. 304 of the Act. The wordings of s. 304 of the Act do not lend itself to be read in such a manner. A single act of doing business to defraud a creditor would be sufficient to trigger an action for compensation against the errant person in his personal capacity. (para 90)

(8) As at 23 April 2008, there was a cash of RM155,134 in the bank account of CNLT, whilst outstanding owing to the employees was around RM1,440,154. The appellant and CNLT continued to carry on business and to incur debts at a time when there was to their knowledge no reasonable prospect of the employees ever receiving payment of their

A salary or their statutory contribution. On the facts of the case, fraudulent trading within s. 304 had been made out and the appellant was liable to the employees. (paras 93 & 94)

Bahasa Malaysia *Headnotes*

B Responden-responden pertama hingga ke 83 ('pekerja-pekerja') bekerja untuk untuk responden ke 84 ('CNLT'), sebuah syarikat tersenarai awam, sementara perayu ('defendan pertama di Mahkamah Tinggi') adalah pada setiap waktu material pengarah urusan eksekutif syarikat tersebut. Pada 16 Januari 2009, Mahkamah Tinggi menggulungkan CNLT dan melantik
C beberapa penyelesai sementara CNLT. Pada tahun 2013, pekerja-pekerja memfailkan guaman terhadap sembilan defendan menuntut tunggakan gaji dan pampasan pekerja berjumlah RM2,910,201.78. Kausa tindakan pekerja-pekerja adalah berdasarkan perniagaan secara frod bawah s. 304 Akta Syarikat 1965 ('Akta') dan/atau konspirasi yang dilakukan oleh defendan-defendan. Adalah kes pekerja-pekerja bahawa perniagaan CNLT dijalankan
D dari tahun 2006 sehingga ia digulungkan pada Januari 2009 dengan niat untuk menipu pemiutang syarikat, atau untuk tujuan penipuan. Melalui tindakan ini, pekerja-pekerja menuntut, antara lain, perintah-perintah berikut: (i) satu pengisytiharan bahawa perniagaan CNLT dijalankan oleh defendan-defendan dengan niat untuk menipu pemiutang CNLT, khususnya
E pekerja-pekerja menurut s. 304 Akta; (ii) satu pengisytiharan bahawa defendan-defendan secara bersama dan/atau secara berasingan dan bertanggungjawab secara peribadi, tanpa apa-apa batasan liabiliti untuk segala hutang atau liabiliti-liabiliti CNLT yang lain; dan (iii) satu perintah bahawa defendan-defendan, secara bersama dan/atau secara berasingan
F membayar hutang tertunggak dan terhutang kepada pekerja-pekerja CNLT. Dalam pembelaannya, perayu mengekalkan bahawa pada setiap waktu material, dia hanya ingin menyelamatkan CNLT dan tidak mempunyai niat untuk menipu atau memperdayakan pekerja-pekerja wang dan faedah yang terhutang kepada mereka. Pada akhir perbicaraan, Hakim Mahkamah Tinggi
G memutuskan bahawa perniagaan CNLT dijalankan oleh perayu dengan niat untuk menipu pemiutang CNLT termasuk pekerja-pekerja bawah s. 304 Akta. Walau bagaimanapun, tiada pengisytiharan diberikan berkenaan pengarah-pengarah CNLT yang lain. Perayu didapati bertanggungjawab secara peribadi kepada pekerja-pekerja, untuk membayar pekerja-pekerja jumlah yang dituntut. Perayu merayu ke Mahkamah Rayuan terhadap
H keputusan tersebut. Hujahan utama perayu adalah bahawa elemen-elemen s. 304 Akta tidak dipenuhi kerana pekerja-pekerja, antara lain, bukan pemiutang-pemiutang pada masa perniagaan secara frod didakwa berlaku. Mahkamah Rayuan, walau bagaimanapun, menolak rayuan perayu dan memutuskan bahawa pekerja-pekerja berhak ke atas jumlah yang dituntut
I kerana penyelesai sementara telah menerima borang bukti hutang, dengan itu

menyetujui dan mengesahkan wang perlu dibayar dan terhutang kepada pekerja-pekerja. Secara ringkasnya, tuntutan pekerja-pekerja diterima sebagai hutang yang sah di bawah undang-undang. Oleh itu, perayu merayu. Kebenaran untuk merayu dibenarkan oleh mahkamah ini atas persoalan undang-undang berikut: sama ada pekerja yang membuat tuntutan emolumen statutori dan sumbangan berhak membuat tuntutan sebagai pemiutang bagi tujuan s. 304(1) Akta.

Diputuskan (menolak rayuan dengan kos):
Oleh Hasan Lah HMP menyampaikan penghakiman mahkamah:

(1) Seksyen 304 menangani perniagaan secara frod atau menjalankan perniagaan dengan niat untuk menipu pemiutang. Seseorang tidak boleh bersembunyi di sebalik tirai perbadanan dan mengelak liabiliti untuk hutang syarikat jika dia telah menggunakan syarikat untuk melakukan penipuan dan menyebabkan pembubaran syarikat. Seksyen ini menyediakan liabiliti terhadap pengarah-pengarah secara peribadi atas dasar bahawa mereka menjalankan perniagaan syarikat dengan niat untuk menipu pemiutang-pemiutang. Untuk pekerja-pekerja berjaya dalam tuntutan bawah s. 304 Akta, pekerja-pekerja perlu membuktikan bahawa (a) mereka adalah pemiutang CNLT; dan (b) selepas mereka menjadi pemiutang CNLT, perniagaan syarikat dijalankan oleh perayu dengan niat untuk menipu pemiutang-pemiutang.

(2) Perayu menyedari akan tuntutan pekerja-pekerja. Perayu membuat kenyataan bertarikh 23 April 2008 dan 24 Jun 2008 selepas penyelesai sementara dilantik untuk memberi jumlah tertunggak kepada pekerja-pekerja. Oleh itu, tidak dapat dipertikaikan bahawa dia mempunyai maklumat dan pengetahuan relevan berkenaan tuntutan-tuntutan ini. Semasa perbicaraan, dia tidak mencabar atau membantah bukti hutang yang diserahkan oleh pekerja-pekerja. Kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan membuat penemuan fakta serentak bahawa wang yang dituntut oleh pekerja-pekerja adalah hutang sah di bawah undang-undang. Setelah membuktikan bahawa mereka berhak ke atas jumlah yang dituntut termasuk gaji yang belum dijelaskan dan emolumen statutori yang lain, pekerja-pekerja dengan itu adalah pemiutang CNLT. Hak pekerja untuk menuntut gaji yang belum dijelaskan diiktiraf dalam s. 292(1)(b), (c) dan (e) Akta.

(3) Perayu menghujahkan bahawa perayu dan pengarah-pengarah CNLT yang lain tidak boleh dipersalahkan atau dipertanggungjawabkan secara peribadi untuk tuntutan pekerja-pekerja kerana penyelesai sementara telah dilantik oleh mahkamah. Walau bagaimanapun, penyelesai sementara tidak boleh bertanggungjawab untuk kebajikan pekerja-pekerja apabila mereka dilantik pada Mei 2008. Pengekalan perkhidmatan pekerja adalah keputusan yang diambil perayu sebagai

pengarah urusan. Keputusan ini diambil untuk mengekalkan perkhidmatan mereka apabila perayu mengetahui bahawa CNLT bukan lagi perniagaan yang masih beroperasi dan tiada prospek untuk pekerja-pekerja menerima ganjaran, meskipun gaji atau faedah penamatan. Sebaliknya, perayu telah secara tidak jujur melucutkan aset yang boleh digunakan oleh badan umum pemiutang tidak bercagar, termasuk pekerja-pekerja. Dengan itu, penyelesai sementara tidak boleh bertanggungjawab kerana tidak menamatkan perkhidmatan pekerja-pekerja. Pekerja-pekerja telah dilepaskan akibat perintah penggulungan 16 Januari 2009 yang berkhidmat sebagai notis pelepasan atau penamatan.

(4) Pekerja-pekerja mendakwa CNLT gagal meremitkan sumbangan KWSP dan SOCSO, kedua-dua majikan dan pekerja, walaupun telah memotong sumbangan pekerja yang diperlukan. Perayu pula mendakwa bahawa wang yang terhutang pada EPF, SOCSO dan IRB adalah wang terhutang pada badan-badan tersebut, dan bukan wang terhutang kepada pekerja-pekerja. Wang itu ditolak daripada gaji pekerja-pekerja dan CNLT memutuskan wang yang diamanahkan adalah untuk penghantaran seterusnya ke badan-badan berkaitan. Apabila CNLT gagal meremitkan wang itu kepada badan-badan berkaitan, CNLT menjadi pemegang amanah atas dasar amanah konstruktif atau quistclose wang itu dengan pekerja-pekerja sebagai penerima. Dengan itu, pekerja-pekerja juga berhak untuk menuntut kembali wang daripada CNLT kerana ia adalah sebahagian gaji pekerja-pekerja dan adalah milik pekerja-pekerja. Oleh kerana pekerja-pekerja berhak menerima wang itu, pekerja-pekerja semestinya pemiutang-pemiutang CNLT. Sebagai pemiutang-pemiutang, dengan itu, mereka berhak membawa tindakan bawah s. 304 Akta.

(5) Perkataan 'creditor' dalam s. 304 Akta harus diambil sebagai meliputi 'contingent or prospective creditor' seperti digunakan dalam s. 217(b) Akta dan perkataan 'prospective creditor' merujuk pada pemiutang yang tuntutannya untuk hutang atau hak menguatkuasakan tuntutan itu dijangka atau mungkin berlaku pada masa akan datang. Pada fakta kes, pekerja-pekerja menjadi pemiutang-pemiutang CNLT pada September 2007 semasa CNLT gagal meremitkan sumbangan statutori pekerja-pekerja bagi bulan Ogos 2007.

(6) Daripada keterangan yang dikemukakan, beberapa dakwaan pekerja-pekerja dibuktikan berlaku pada atau selepas September 2007: (i) pembayaran yang tidak dibenarkan dibuat daripada aset-aset CNLT semasa tempoh apabila perintah larangan bertarikh 26 Oktober 2007 berkuat kuasa dan pada 21 Januari 2008, pembayaran RM50,104 telah dibuat daripada wang CNLT kepada perayu; (ii) pengeluaran tiga cek

tunai berjumlah RM160,000 dan ditunaikan walaupun perintah pelantikan penyelesai sementara diserahkan pada CNLT. Daripada bayaran-bayaran tersebut, ini berjumlah pada pengaliran wang berjumlah RM160,000 yang sepatutnya diberikan kepada pemiutang tidak bercagar atau pekerja-pekerja; (iii) kegagalan CNLT meremitkan sumbangan kepada EPF dan SOCSO dan membuat bayaran kepada IRB walaupun penolakan telah dibuat, berjumlah pada peninggalan yang disengajakan, dengan niat tidak jujur menyalurkan dana itu daripada CNLT memihak pada pemiutang tidak bercagar dan pemegang-pemegang saham yang terpilih; dan (iv) pelupusan aset daripada jangkauan penyelesai sementara pada Mei 2008.

(7) Perayu menghujahkan bahawa untuk tuntutan bawah s. 304 Akta, penyataan tuntutan harus secara khususnya mengenal pasti bagaimana perniagaan syarikat dijalankan dengan niat untuk menipu pemiutang-pemiutang. Isu ini dipertimbangkan dan ditangani oleh Mahkamah Rayuan dan ia berpendapat bahawa tidak perlu untuk mewujudkan skim menipu dari pihak perayu bagi mencetuskan penggunaan s. 304 Akta. Perkataan-perkataan s. 304 Akta tidak membenarkan pembacaan sedemikian. Satu kelakuan perniagaan untuk menipu pemiutang adalah memadai bagi mencetuskan tindakan pampasan terhadap pihak yang salah dalam kapasiti peribadinya.

(8) Pada 23 April 2008, terdapat wang sebanyak RM155,134 dalam akaun bank CNLT, sementara hutang yang tertunggak pada pekerja-pekerja adalah RM1,440,154. Perayu dan CNLT terus menjalankan perniagaan dan menanggung hutang apabila mereka mengetahui tiada prospek munasabah untuk pekerja-pekerja mendapat gaji mereka atau sumbangan statutori. Pada fakta kes, perniagaan secara frod dalam maksud s. 304 telah dibuktikan dan perayu adalah bertanggungjawab kepada pekerja-pekerja.

Case(s) referred to:

Aneka Melor Sdn Bhd v. Seri Sabco (M) Sdn Bhd & Another Appeal [2016] 2 CLJ 563 CA ***(refd)***

Ang Hiok Seng v. Yim Yut Kiu [1997] 1 CLJ 497 FC ***(refd)***

Argha Sen v. Interra Information (2007) 75 SCL 150 Delhi ***(refd)***

Beluga Chartering (in liquidation) v. Beluga Projects (Singapore) Pte Ltd (in liquidation) and another [Deugro (Singapore) Pte Ltd, non-party] [2013] 2 SLR 1035 ***(refd)***

Jitendra Nath Singh v. Official Liquidator and Others [2013] SCC 462 ***(refd)***

Jonathan Allen v. Zoom Developers Private Limited (Indlaw MP 293) ***(refd)***

Letchumanan Chettiar Alagappan (As Executer to SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***

Morphitis v. Bernasconi and Others [2003] 2 BCLC 53 ***(refd)***

Premium Vegetable Oils Bhd v. ICG Systems Sdn Bhd & Ors [2006] 7 CLJ 364 HC ***(refd)***

A *R v. Kemp [1988] 1 QB 645* ***(refd)***
Re CW & AL Hughes Ltd [1996] 2 All ER 702 ***(refd)***
Re Gerald Cooper Chemicals Ltd [1978] 2 All ER 49 ***(refd)***
Re Lehman Brothers International Europe [2010] I BCLC 496 ***(refd)***
Rossleigh Ltd v. Carlaw [1986] SLT 204 ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***
B *Siow Yoon Keong v. H Rosen Engineering BV [2003] 4 CLJ 68 CA* ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 217(1)(b), 218, 292(1)(b), (c), (e), 304(1)
Employees Provident Fund Act 1991, s. 43(1)
Employees' Social Security Act 1969, s. 6(1)
C Income Tax Act 1967, s. 106(1)
Inland Revenue Board of Malaysia Act 1995, s. 10

The Companies Act 1956 [Ind], ss. 430, 433(e)

Other source(s) referred to:
Walter Woon On Company Law, para 17.198, p 777

D

For the appellant - Malik Imtiaz, Saaran Nadarajah & Surendra Ananth; M/s Saaran & Co
For the 1st to 83rd respondents - Wong Rhen Yen, Eric Tan, Emily Goh & Emily Wong; M/s Ong Kok Bin & Co
For the 84th respondent - M Menon, S Raven, Siti Nur Amirah Aqilah Adzman;
E *M/s S Ravenesam*

[Editor's note: For the Court of Appeal judgment, please see JCT Limited v. Muniandy Nadasan & Ors And Another Appeal [2016] 3 CLJ 692 (affirmed);
For the High Court judgment, please see [2014] 1 LNS 640 (overruled).]

Reported by Suhainah Wahiduddin

F

JUDGMENT

Hasan Lah FCJ:

Introduction

G

[1] This is an appeal against the decision of the Court of Appeal dated 30 December 2015 which dismissed the appellant's appeal with costs. Leave to appeal was granted by this court on 21 July 2016 on the following question of law:

H

> Whether an employee who makes a claim of statutory emoluments and contributions is entitled to make a claim as a creditor for the purpose of section 304(1) of the Companies Act 1965.

[2] We heard the appeal on 9 January 2017 and at the end of the hearing, we dismissed the appeal with costs.

I

[3] We now provide the grounds of our decision.

[4] The appellant was the first defendant in the High Court. There were altogether nine defendants in the High Court. The 84th respondent was the ninth defendant. The first to 83rd respondents were the plaintiffs in the High Court.

[5] For the purpose of this judgment, the first to 83rd respondents will be referred to as "the employees" and the 84th respondent will be referred to as "CNLT".

Background Facts

[6] The employees worked with CNLT, a public listed company incorporated in Malaysia and listed on Bursa Malaysia Securities Berhad.

[7] The appellant was an Indian national and a permanent resident of Malaysia, who at all material times was the executive managing director of CNLT.

[8] On 16 January 2009, the High Court at Kuala Lumpur, *vide* Kuala Lumpur Winding-up Petition No. D2-28-754-2007, wound up CNLT and appointed Mr Wong Chan Mew and Mr Ong Kong Lam as the joint and several provisional liquidators of CNLT.

[9] In 2013, the employees filed a suit against the nine defendants to claim for arrears of salary and workers' compensation in the total sum of RM2,910,201.78. The particulars of this claim for each employee were set out in the second schedule to the re-amended statement of claim.

[10] The employees' cause of action was predicated upon an action for fraudulent trading under s. 304 of the Companies Act 1965 ("Act") and/or for conspiracy committed by the first to eighth defendants.

[11] The employees' complaint of fraudulent trading straddled eight allegations of fact that allegedly occurred between 2006 and 2008. They were as follows:

(a) CNLT, primarily through its managing director, the appellant, prepared or issued fictitious invoices in 2007 to an entity known as MTI (Far East) Sdn Bhd amounting to RM4,271,745.06 with a view to inflating or overstating its revenue, such that CNLT would appear to be a 'going concern', or at the very least, not as insolvent as it actually was;

(b) Overstating the value of the plant and machinery of CNLT;

(c) Siphoning of CNLT's funds by way of payment of rental to Golden Privilege Sdn Bhd when there was no such tenancy agreement. This company was controlled by the appellant and the seventh defendant;

A (d) CNLT's assets in the sum of USD1,250,000 were dissipated or channelled to CNLT's largest shareholder, JCT Limited, the eighth defendant after CNLT had been listed as a PN17 company;

(e) CNLT, through *inter alia*, the appellant caused three cheques in the sum of RM160,000 to be issued on 11 September 2007. These cheques were
B encashed on 12 September 2007;

(f) Failure to cause CNLT to remit contribution to Employees Provident Fund ("EPF") and Social Security Organization (SOCSO), both employer and employee despite deducting the requisite employee contribution since August 2007. Neither was income tax paid, despite
C the requisite deductions having been made;

(g) The appellant's action in dissipating assets out of the reach of provisional liquidators in May 2008; and

(h) Payments were made out to preferred unsecured creditors, as well as
D some shareholders in the sum of not less than RM2,841,696 without validation at the time the restraining order dated 26 October 2007 was in force.

[12] It was the employees' case that by reason of the foregoing matters the
E business of CNLT was carried on from 2006 onwards until it was wound up in January 2009 with intent to defraud creditors of the company, or for a fraudulent purpose. For the purpose of the application of s. 304 of the Act in this suit, the creditors contemplated here were the employees.

[13] By this action, the employees sought *inter alia* the following orders:

F (a) a declaration that the business of CNLT had been carried on by the defendants with intent to defraud creditors of CNLT, in particular the employees pursuant to s. 304 of the Act;

(b) a declaration that the defendants shall be jointly and/or severally liable and personally responsible, without any limitation of liability for all of
G the debts or other liabilities of CNLT; and

(c) an order that the defendants, jointly and/or severally to pay the outstanding debt due and owing to the employees by CNLT.

[14] In his defence, the appellant maintained that at all material times he
H was concerned primarily with the rescue and salvage of CNLT. He had no intention, let alone dishonest intention to 'cheat' or 'deceive' the employees of monies or benefits lawfully due to them.

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[15] The second to fourth defendants, who were resident in India, chose not to testify but adopted the appellant's evidence in support of their defence that they were not executive directors managing CNLT's affairs on a day to day basis. As such, they denied that they possessed the requisite dishonest intention required under s. 304 of the Act.

[16] The fifth and sixth defendants' defence was that they were at all times non-executive directors who left the management of the company entirely in the hands of the appellant, and that they resigned from CNLT in July and August 2007 and were therefore not privy to any carrying on of the business of CNLT with a view to defrauding its employees between May 2008 to January 2009.

[17] The defendants also collectively pointed to the fact that provisional liquidators were appointed in May 2008 and who took possession of CNLT's premises as of mid-May 2008. It was their contention that upon the appointment of the provisional liquidators, they had no further obligation or responsibility to the business of CNLT, including the employees. They therefore denied liability for any payments claimed by the employees and due from June 2008 to January 2009.

[18] At the end of the trial, the learned trial judge held that the employees had proved seven out of eight allegations. It was held that allegation (c), the siphoning of CNLT's funds by way of payment of rental to Golden Privilege Sdn Bhd, was not made out. The learned trial judge found that payments to JCT Limited were void as they were against the law prohibiting undue preference.

[19] The learned trial judge accordingly held that the business of CNLT was carried on by the appellant with intent to defraud the creditors of CNLT including the employees pursuant to s. 304 of the Act. A declaration was made to that effect by the court. There was however no such declaration granted in respect of the other directors of CNLT. The court also held that the appellant was personally liable to the employees, to pay the employees the sum of RM2,910,201.78 as claimed with interest.

[20] The appellant appealed to the Court of Appeal against the decision of the learned trial judge. The appellant's primary contention was that the elements of s. 304 of the Act were not fulfilled. The appellant's arguments could be summarised as follows:

(a) in order to show that the conduct complained of was caught by the said section, it had to be shown that the employees were creditors of CNLT at the time the appellant allegedly defrauded them, such fraud being part of a scheme directed at the employees;

(b) the employees' pleaded case was not framed as such. Instead, the pleaded case included various allegations of general fraud. Importantly, seven out the eight allegations allegedly happened at a time when the employees were not creditors;

(c) if at all, the employees only became creditors of CNLT (which was denied) after 30 April 2008, when they were no longer paid their salaries as employees. At that juncture, the appellant did not have any control over management, as provisional liquidators had been appointed. Prior to that, they were not creditors for the purposes of s. 304 of the Act. They were paid their salaries up until that point in time; and

(d) therefore, even if the allegations of fraud were borne out, the requirements under s. 304 of the Act were not fulfilled, as the employees were, *inter alia,* not creditors at the time that the alleged fraudulent trading was perpetrated.

[21] In its judgment, the Court of Appeal accepted that it was necessary for the employees to have been creditors at the time the alleged fraudulent trading was perpetrated. The Court of Appeal made the following observations:

> [75] It was the contention of the learned counsel for the Appellant that section 304(1) of CA is meant to apply in a situation where there already existed creditors when the impugned and fraudulent conduct was allegedly committed by the errant director. It was the Appellant's case that the Respondents only became creditors in 2008 when it was admitted that the CNLT was not able to pay them, as employees of CNLT, their salaries for March and April in 2008 despite an assurance that they were to be paid their salaries by CNLT.
>
> [76] The Appellant had complained because the learned trial Judge had gone way back in point of time to consider the conduct of the Appellant in 2007 as well. That according to the learned counsel was unwanted.
>
> [77] We had looked at the Records of Appeal and what we saw was that the EPF contributions from the Respondents in 2007 though deducted from their salaries were nevertheless not remitted to the Employee's Provident Fund. Neither were CNLT's contributions in respect of the Respondent employees remitted to the said Fund. Yet during these times, the CNLT, primarily through acts attributable to the Appellant, who was then the Managing Director of CNLT, had continued to do business, in order to exhibit to the creditors that it was a going concern when in fact, it was not. That is an incidence of fraudulent carrying on of business. In fact, there was direct evidence as to the intention of the Appellant to defraud the creditors way back in 2006, if not in 2004 when he told Man Mohan Thapar, D2, that it was his intention to make it appear that CNLT was seen as a going concern to the creditors when in fact it was not. [See page 52 of the learned trial Judge's GOJ].

> [78] The fact that the Respondents were entitled to the sum as prayed in their Statement of Claim ("SOC") could not be disputed as the liquidators had accepted their proof of debt forms, thereby acceding to and confirming that these monies were due and owing to the Respondents. In the words of the learned trial Judge,
>
> In short the claims of the employees have been accepted as valid debts under the law. They rank however, as unsecured creditors.
>
> This can be seen at page 7 of her Grounds of Judgment.

[22] Thus, the question of law posed in this appeal related to this only issue.

Submissions Of The Appellant

[23] It was submitted that the employees were not creditors of CNLT for the purpose of s. 304 of the Act when their statutory contributions were not paid to the relevant bodies by CNLT. The monies owed to EPF, SOCSO and the IRB were debts to the said bodies and not to the employees.

[24] CNLT, as the employer of the employees, was liable to pay monthly statutory contributions for the employees pursuant to s. 43(1) of the Employees Provident Fund Act 1991. In the event an employer fails to pay contributions to EPF, the employer and its directors would be jointly liable to pay contributions pursuant to s. 6 of the Employees Provident Fund Act 1991. It was for this reason that the EPF Board instituted proceedings against the appellant and three other directors of CNLT for its failure to remit the necessary contributions. The said debt was ultimately paid to the EPF.

[25] It was also submitted that the employees did not have a propriety interest over their contributions (including the portion paid by their employer) to the EPF as their contributions belonged to the EPF. They could only withdraw the said contributions upon authorisation by the EPF Board.

[26] Similar argument was made by learned counsel for the appellant with regard to the contributions made to SOCSO. Contributions under s. 6(1) of the Employees' Social Security Act 1969 are payable to SOCSO. Any contribution owed to SOCSO is a debt owed to it. As such, the creditor was SOCSO and not the employees.

[27] With regard to the income tax, it was submitted that the Inland Revenue Board acts as the Government's agent in collecting income tax pursuant to s. 10 of the Inland Revenue Board of Malaysia Act 1995. Monies paid as taxes ultimately belong to the Government. Any tax due is a debt due to the Government. Section 106(1) of the Income Tax Act 1967 provides that tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.

[28] With regard to the finding of the learned trial judge that the employees were creditors of CNLT by reason of them having lodged proof of debt forms ("PODFs") and the fact that the statement of affairs dated 23 April 2008 lodged by the directors of CNLT upon appointment of the provisional liquidators, it was contended that the learned trial judge failed to give due consideration to the requirements under the Companies Winding-Up Rules 1972 as to the lodging of PODFs where the creditor is required to lodge an affidavit verifying and showing particulars of the debt. It was further argued that the liquidators in the instant case did not take steps to verify the said debts.

[29] It was also submitted that reliance on the statement of affairs dated 23 April 2008 was misconceived as it did not condescend to details as to who owed what. Furthermore, the amount stated therein reflected the liabilities of CNLT only as at 23 April 2008, and not for the entire period in which the debt was claimed for.

[30] According to learned counsel for the appellant, the learned trial judge erred in considering the various allegations by the employees from the period covering 2006 to end 2008. These matters were wholly irrelevant as the employees had not yet become creditors of CNLT. They only became creditors on 30 April 2008 at the earliest.

[31] Relying on the cases of *Re Gerald Cooper Chemicals Ltd* [1978] 2 All ER 49 and *Morphitis v. Bernasconi and Others* [2003] 2 BCLC 53, learned counsel submitted that only events after the fraudulent misrepresentation should be taken into account in determining whether any business of the company was carried out with intent to defraud creditors. According to learned counsel, a claim under s. 304 of the Act in the instant case could not be sustained as there were no active steps taken by the appellant to defraud at any point after the employees became the creditors of CNLT.

[32] It was also submitted that for a claim under s. 304 of the Act to succeed, there must be shown that there was a plan or scheme to defraud the creditors. The claim must knit together the various allegations to show how it all formed part of a plan or scheme to defraud the employees. In support of that contention, learned counsel cited the case of *Rossleigh Ltd v. Carlaw* [1986] SLT 204 which was decided by the Court of Session in Scotland.

[33] In relation to this, it was therefore submitted that the Court of Appeal had erred in determining that there was no need to establish a scheme to defraud creditors under s. 304 of the Act. According to learned counsel, in *Siow Yoon Keong v. H Rosen Engineering BV* [2003] 4 CLJ 68; [2003] 4 MLJ 569 the Court of Appeal did not set down that proposition of law as in that case the fraud complained of was directed against the complainant as opposed to fraud in the general sense.

[34] With regard to the non-payment of the salaries of the employees, it was submitted that after the appointment of the provisional liquidators on 23 April 2008 to manage the affairs of the company, any debt if at all, was incurred during the time that provisional liquidators were in control of the company and as such the appellant was not in a position to pay the salary of the employees from that time.

[35] Finally, learned counsel for the appellant submitted that the burden of proof to be applied in this case which involved allegation of fraud in civil proceedings, is the criminal standard of proof beyond reasonable doubt and not on the balance of probabilities as decided by this court in *Ang Hiok Seng v. Yim Yut Kiu* [1997] 1 CLJ 497; [1997] 2 MLJ 45.

Submissions Of The Employees

[36] It was first impressed upon us that in this case, there were concurrent findings of facts by both the High Court and the Court of Appeal from overwhelming evidence that CNLT's actions, through the appellant, were designed to defraud the creditors.

[37] Learned counsel submitted that the word 'creditor' in s. 304 of the Act ought to be interpreted to include contingent or prospective creditors of a company as provided for in s. 217(1)(b) of the Act. In support of that contention, he cited the decision of High Court in *Premium Vegetable Oils Bhd v. ICG Systems Sdn Bhd & Ors* [2006] 7 CLJ 364; [2006] 7 MLJ 39.

[38] It was therefore submitted that the employees, whose salaries had not been paid in addition to the failure of the appellant and other directors to remit the statutory contributions and income tax were entitled to enforce their claim against CNLT as an action of debt, since the provisional liquidators admitted and accepted their PODFS, making them lawful creditors of CNLT.

[39] Several cases from other jurisdictions were cited by learned counsel to show that the courts in those countries recognised that employees have a pecuniary claim against the company which would be satisfied out of the assets as a debt due from the company and as creditors they would have rights to file the petition as creditors under the Companies Act of those countries. Those cases are as follows:

(a) *Re Lehman Brothers International Europe* [2010] I BCLC 496;

(b) *Re CW & AL Hughes Ltd* [1996] 2 All ER 702;

(c) *Beluga Chartering (in liquidation) v. Beluga Projects (Singapore) Pte Ltd (in liquidation) and another [Deugro (Singapore) Pte Ltd, non-party]* [2013] 2 SLR 1035;

(d) *Jitendra Nath Singh v. Official Liquidator and Others* [2013] SCC 462;

(e) *Argha Sen V Interra Information* (2007) 75 SCL 150 Delhi; and

(f) *Jonathan Allen v. Zoom Developers Private Limited* (Indlaw MP 293).

[40] It was submitted that there were at least two heads of allegations which happened when the employees became the creditors of CNLT, which were as follows:

(a) failure to cause CNLT to remit statutory contributions and to make payment for income tax even though there were deductions; and

(b) the appellant's action in dissipating assets (stocks) out of the reach of the provisional liquidators sometime in May 2008.

Submissions Of CNLT

[41] Learned counsel for CNLT also submitted that the word 'creditor' in s. 304 of the Act ought to be interpreted to include "a contingent or prospective creditor of a company" as provided for under s. 217(1)(b) of the Act. It was further submitted that there should not be any distinction in the definition of 'creditor' in relation to s. 304 of the Act and the other provisions of the Act.

[42] Since the employees' salaries were not paid for several months, it was submitted that the employees were entitled to enforce their claim against the company by an action of debt. According to learned counsel, the employees were therefore entitled to be categorised as creditors of the company. Learned counsel also cited the Indian cases of *Argha Sen* and *Jonathan Allen* (which were also cited by learned counsel for the employees in his submission) to support his contention.

[43] Learned counsel for CNLT further submitted that clear evidence was led at the trial to show the manner in which the appellant deceived the employees into believing that the company was still a going concern despite being undergoing winding-up proceedings. There was therefore a clear intention on the part of the appellant to defraud the employees.

Decision Of This Court

[44] Section 304(1) of the Act reads as follows:

> 304(1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business

in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

[45] Section 304 of the Act deals with fraudulent trading or carrying on a business with an intention to defraud creditors. A person will not be able to hide behind the corporate veil and avoid liability for the company's debts if he has used the company to perpetrate fraud and the company went into liquidation. The section provides for liability against directors personally on the basis that they carried on business of the company with the intention of defrauding creditors.

[46] In *Aneka Melor Sdn Bhd v. Seri Sabco (M) Sdn Bhd & Another Appeal* [2016] 2 CLJ 563, at p. 575, the Court of Appeal made the following observation:

[37] Section 304 of the Companies Act 1965 is aimed principally at curbing the possibility on the part of the officers of a company to act opportunistically and take advantage of the principle of the separate legal personality and the principle of limited liability. As an exception to these principles, there are circumstances when the law duly acknowledges, and for which it accordingly provides the possibility, in very specific situations, for the corporate veil to be pierced. Once the corporate veil has been pierced the creditors of the company whose veil has been pierced may satisfy their claims from the personal assets of the company's shareholders.

[47] The learned trial judge, after considering several English cases on the similar provision, came to the following conclusions:

(a) in order to establish an intent to defraud creditors, the element of dishonesty is an essential ingredient; and

(b) dishonesty is a question of fact which has to be ascertained from a consideration of the entirety of the relevant circumstances.

[48] In her judgment, the learned trial judge *inter alia* made the following observation:

46. Suffice to say that in examining the present factual matrix I am conscious that it is necessary to find the following key elements:

(a) if the evidence so discloses, a finding that the subject directors carried on the business of CNLT when they were conscious or aware that there was no prospect of the creditors ever receiving payment;

(b) an element of dishonesty on the part of the directors in so conducting the business of CNLT.

[49] In order to succeed in their claim under s. 304 of the Act, the employees need to prove that:

(a) they were the creditors of CNLT; and

(b) after they became the creditors of CNLT, the business of the company was carried on by the appellant with intent to defraud them as creditors.

In other words, the conduct complained of must have taken place after they became the creditors.

[50] In the courts below and before us, learned counsel for the appellant raised the issue of the standard of proof even though the question on the standard of proof was disallowed by this court at the leave stage. Learned counsel for the appellant relied on the decision of this court in *Ang Hiok Seng @ Ang Yeok Seng v Yin Yut Kin (supra)* to argue that the law as it stood during the High Court stage was that criminal fraud in civil proceedings had to be proven beyond reasonable doubt.

[51] It was submitted that the Court of Appeal erred in applying the decision of this court in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] 5 MLJ 1 in concluding that the appropriate standard of proof should be on the balance of probabilities.

[52] In relation to this issue, the Court of Appeal held as follows:

> [71] We are of the view that the proper standard of proof, required to be proved as stated by the apex Court in the *Sinnaiyah* case *(supra)* in a civil case involving allegation of fraud is applicable to this case. This is because this case, being an on-going appeal, is therefore, still a 'live' case, as opposed to those cases which had been finally adjudicated in terms of their final appeals. To our mind, that was what the apex Court had meant when it said that the ruling did not have a retrospective effect. It does not apply to cases that had been finally decided. It is our considered view that all the cases pending disposal in the appeal Courts would qualify as 'future' cases referred to in the *Sinnaiyah* case *(supra)* because it would be incongruous indeed for the appeal Courts to apply a wrong law in deciding those cases which final fate have not yet been finally determined. All cases which are pending final disposal of their appeals, are therefore included in the so-called 'future cases' in the *Sinnaiyah* case *(supra)*. In other words, the operative standard in this case is the normal civil standard of proving on the balance of probabilities.

[53] We agree with the Court of Appeal that the decision of this court in *Sinnaiyah* was applicable to this case as the appeal of this case was still pending in the Court of Appeal when this court delivered its judgment in *Sinnaiyah* case. In fact, this issue has been decided by this court in *Letchumanan Chettiar Alagappan (As Executor to SL Alameloo Achi (Deceased) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418 at pp. 480 and 481:

[88] Prospective overruling had been applied in Malaysia. But was it applied in *Sinnaiyah*, such that it had no retrospective effect, even to the instant appeal from a decision decided by the trial court before the change in the law? "It is a fundamental principle of adjudicative jurisprudence that all judgments of a court are retrospective in effect" (*Abillah Labo Khan v. PP* [2002] 3 CLJ 521; [2002] 3 MLJ 298 per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court). "The law as so stated applies not only to that case but also to all cases subsequently coming before the courts for decision, even though the events in question in such cases occurred before the … decision was overruled" (*Kleinwort Benson Ltd*). "Because of the doctrine of precedent, the same would be true of everyone else whose obligations would be decided according to the law as enunciated … even though the relevant events occurred before that decision was given" (Lord Nicholl's fourth "feature" in the judicial system, see also *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 MLJ 393, where it was held by the court per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court, that the Court of Appeal was bound to follow *Muhammad bin Hassan*, notwithstanding that the conviction was handed down before the change in the law). The law as so stated in a superior judgment would apply to cases which have not yet gone to trial or are still in progress and to appeals that have been brought timeously but have not yet been concluded (*Cadder v. Her Majesty's Advocate* per Lord Hope) and to matters or cases not yet finally determined, but the retrospective effect of a judicial decision is excluded from cases already finally determined (*Cadder v. Her Majesty's Advocate* per Lord Rodger). That is the common law position. There was no departure in *Sinnaiyah* from the common law position when the court said "we should make it clear that this judgment only applies to this appeal and to future cases and should not be utilised to set aside or review past decisions involving fraud in civil claims". The court merely underscored the retrospective and prospective effect of its decision, to apply to that appeal and to future cases, to cases as yet not filed and trials or appeals which have yet to be finally determined, but not to past cases which have reached a terminal end. The ruling in *Sinnaiyah* was not in the prospective – only form. *Sinnaiyah* applies to all cases that have not been finally determined, including all pending appeals, except that in the instant appeal, it does not matter.

[54] As such, we found no merit on this issue.

Whether The Employees Are Creditors?

[55] In their amended statement of claim, the employees claimed a total sum of RM2,910,201.76 as pleaded in the second schedule for non-payment of wages from April 2008 to 16 January 2009, indemnity and termination benefits. The learned trial judge allowed the claim and further declared that the appellant was personally liable for the amount claimed.

[56] The learned trial judge made that finding based on the evidence of the liquidator of CNLT (DWI) who confirmed in his testimony that the employees were entitled to the sums claimed as evidenced by the approval of PODFs and also based on the statement of affairs dated 23 April 2008 filed by the directors of CNLT upon the appointment of a provisional liquidator which disclosed that the total combined sum of payment need to be made to EPF, SOCSO, IRB and for outstanding wages amounted to RM914,389 at that juncture.

[57] In his evidence, the liquidator testified that he received all the 83 PODFs from the employees but that he did not check and verify them. Due to the absence of verification by the liquidator, learned counsel for the appellant submitted that it was unreasonable for the learned trial judge to accept the PODFs as valid.

[58] Learned counsel for the appellant cited *Walter Woon On Company Law* at para. 17. 198 in p. 777 which stated that:

> It is one of the liquidator's primary functions to assess the proofs of debt lodged with him. His statutory duty is to admit all real claims to proof, and he is not bound by any statements or representations that the directors may have made to prospective creditors as to the amounts owed to them.

[59] It is also important to consider the other part of DWI's evidence when he testified that he accepted the 83 PODFs as correct as they were also verified by the Commissioner for Oath. DWI explained that he could not verify them because the books and the wages record were not available. Under cross-examination, DWI confirmed that the liquidators had accepted the PODFs as correct.

[60] The appellant, who was the Executive Managing Director of CNLT, was aware of the claim made by the employees. The appellant even lodged statement of affairs dated 23 April 2008 and 24 June 2008 after the liquidators were appointed giving outstanding sums due to the employees. Thus, it was incontrovertible that he had the relevant information and knowledge of these claims. During the trial, he did not challenge nor object to the PODFs lodged by the employees.

[61] Based on the evidence available, both the High Court and the Court of Appeal made a concurrent finding of fact that the monies claimed by the employees in their amended statement of claim were valid debts under the law. The appellant attempted to persuade this court to re-evaluate the findings of fact by the courts below. The learned trial judge gave credible reasons for her findings. She had the benefit of hearing testimonies and observing the demeanour of the witnesses. It would therefore need very clear and convincing reasons to justify us to reverse what had already been

decided. We had examined those findings of fact by the learned trial judge and the reason given by her and we were satisfied that, on the facts of the case, any reasonable tribunal would have made a similar finding of fact.

[62] Having proved that they were entitled to the sum claimed which included the outstanding wages and other statutory emoluments, the employees were therefore the creditors of CNLT. The rights of an employee to claim for outstanding wages and salaries are recognised by s. 292(1)(b), (c) and (e) of the Act.

[63] The Indian courts recognised the employee's right as a creditor to file the winding-up petition against the employer company. In *Argha Sen* the employees filed petition for the winding-up of the company when the company did not pay them terminal dues in spite of a statutory notice. In that case, learned counsel for the company submitted that an employee is not a 'creditor' within the meaning of s. 430 of the Indian Companies Act 1956 (which is in *pari materia* with s. 217 of the Act) and winding-up petition under s. 433(e) of the Indian Companies Act 1956 (which is in *pari materia* with s. 218 of the Act) could be filed only at the instance of a creditor.

[64] The Delhi High Court held that:

> 16. It cannot be disputed that non-payment of salary/terminal dues would give a right to an employee to bring an action against the employer, ie, an actionable claim. Here we are concerned with a private employer. The Supreme Court has gone to the extent of holding that even salary payable to a Government servant would constitute debt and earlier thinking that a Government servant cannot sue for his salary, it being bounty of the Crown and not a contractual debt, is no more valid, pleasure doctrine would not apply in such a case and Government servant would be within its right to maintain a suit against Government for recovery of his earned salary/dues, which is debt payable to the employee. *Union of India v. Tulsiram Patel* [1985] 3 SCC 399 para 52. Therefore, it can be concluded that the dues, which are recoverable by the petitioner from the respondent-company, are the 'debts'. As a corollary, the employee whose debts are not paid shall have to be treated as a 'creditor'.

[65] In para. 22 of its judgment, the Delhi High Court made the following observation:

> … A worker *per se* may not have right to file the winding-up petition. But when he becomes a 'creditor' he will have right to file the petition as a 'creditor' which category is stipulated in Section 439(1)(b) of the Act.

[66] In the High Court of Madhya Pradesh case of *Jonathan Allen*, the issue for determination was whether unpaid wages/salary of workman/employee could be covered within the meaning of debts under s. 433(e) of the Indian Companies Act 1956. In the judgment delivered by Chief Justice A.M. Khanwilkan on 24 August 2015, the court made the following observations:

A 15. The expression "Creditor" is intrinsically linked to the expression "debt"/"debts". Wherever it is a case of "debts", the person, who is entitled to receive the amount, as belonging to him, is necessarily a creditor. No provision of any statute much less of the Companies Act has been brought to our notice, which expressly or impliedly excludes the dues to be received by the employee – be it, in service or former employee – B from the character of a debt to be paid by the Company; and for which reason the person so employed is not a creditor of the Company, within the meaning of Section 439 or any other provision of the Companies Act.

[67] In para. 29 of the said judgment, the court held:

C 29. We accordingly, hold that the employee of the Company has locus to file Company Petition in respect of his unpaid wages/salary and emoluments, as having been filed by a creditor of the Company. As a concomitant, the opinion of the learned Company Judge of our High Court in the case of *Pawan Kumar Khullar (supra)*, is overturned.

D **[68]** In her judgment, the learned trial judge rejected the appellant's contention that neither the appellant nor the other directors of CNLT could be blamed or held liable personally for the employees' claims because provisional liquidators were appointed by the court. The learned trial judge had this to say:

E 177. It is trite that the function of the provisional liquidator is primarily to preserve the assets of the company in respect of which a winding up petition is presented. The company has not as yet been wound up and the provisional liquidator is appointed primarily to ensure that there is no dissipation of assets pending the winding up of the Court. These assets will then be available to the body of creditors. If assets are withered away F when a winding up petition is presented it is entirely possible, (as indeed was the case here) that substantive assets may be disposed of prior to the grant of the actual order winding up the company. On the other hand, it must be borne in mind that the company may not be wound up. At the hearing of the petition it is entirely possible that the outcome is that the petition is dismissed. As such there is a real distinction between a G provisional liquidator and a liquidator appointed post the winding up order. A provisional liquidator does not necessarily have the powers of the official liquidator who is appointed after the company has been wound up. It is reiterated that the primary concern of the provisional liquidator is to preserve the assets and not so much to take a decision to sell the entirety of the assets or discharge the employees etc. In any event, in the instant H case Sahgal and D7 had issued specific memoranda to the employees putting them on leave until further notice. This was an active step taken to assert that their contracts of employment remained intact. These memoranda were issued although operations had ceased. Electricity had been cut off. The provisional liquidator merely maintained *status quo* by following up on the stance taken by the Managing Director and Human

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Resource Director. In any event, as provisional liquidators, they were not expected to make serious management decisions which would alter irretrievably the *status quo* of CNLT. Put another way, if the provisional liquidators had taken a decision to terminate the services of the employees, and subsequently the 2nd winding up petition had in fact been dismissed, the provisional liquidators would arguably be responsible for any decision taken to terminate the services of the employees.

178. For this reason, it appears to me that the Provisional Liquidators cannot be held responsible for the welfare of the employees upon their appointment in May 2008. The retention of the employees' services was a deliberate decision taken by Sahgal as Managing Director and communicated by the Human Resource Manager. This decision was taken to retain their services when Sahgal knew for a fact that CNLT was no longer a going concern and there was no prospect of these employees receiving their remuneration, *albeit* salary or termination benefits. Sahgal had instead by this time dishonestly dissipated assets to JCT Limited and himself, which could have been utilised by the general body of unsecured creditors, including the employees. As such, the Provisional Liquidators cannot in these circumstances be held responsible for not terminating the services of the employees upon their appointment. The employees stood discharged as a consequence of the winding up order of 16 January 2009 which served as notice of such discharge or termination. (see *Chapman*'s Case Law Rep. 1 Eq. 346; *In re Oriental Bank Corporation. MacDowall's Case* (1886) 32 Ch D 366 at 368).

[69] We agree with the finding of the learned trial judge on this issue and we find no merit in the submission of the appellant on this issue.

[70] The other aspect of the employees' case against the appellant and CNLT was that it was alleged that CNLT failed to remit EPF and SOCSO contributions, both employer and employee, despite deducting the requisite employees' contributions. It was also alleged that the income tax, despite the requisite deductions having been made, was not paid.

[71] The learned trial judge found that the precise period for which EPF was not paid was for the months of August 2007 until December 2007 and from April 2008 to May 2008 amounting to about RM159,000. The learned trial judge made the following observations:

147. This is not in dispute. However it is relevant to note that deductions made from employees salaries towards mandatory statutory payments like EPF, SOCSO and income tax mean that the employer holds the employees' portions on trust for onward transmission to the relevant authorities. The employer has no ownership of those monies which comprise a contribution from the employees. Therefore utilisation of those monies is tantamount to a breach of trust.

151. It is clear from this non-payment of statutory dues, comprising the entitlement of the employees, that there was a clear and successful attempt by CNLT primarily through its managing director Sahgal, to appropriate:-

(a) monies rightfully payable to, and

(b) monies belonging to the employees to other preferred creditors in contravention of section 293 of the Companies Act 1965 read with section 53 of the Bankruptcy Act 1967.

152. When this failure or omission to pay these statutory entitlements is considered in the context of other payments being siphoned out to shareholders as discussed earlier on in this judgment, it follows that the failure to remit these statutory payments amounted to a deliberate omission, with the dishonest intention of channelling these funds out of CNLT in favour of preferred unsecured creditors and shareholders.

153. This allegation is substantiated.

[72] As mentioned earlier, it was the appellant's contention that the monies owed to EPF, SOCSO and IRB were debts owed to the said bodies, and not to the employees. Those monies were deducted from the employees' salary and as rightly held by the learned trial judge, CNLT held the monies on trust for onward transmission to the relevant bodies. When CNLT failed to remit the monies to the relevant bodies, the CNLT became the trustee on the basis of constructive or quistclose trust of the monies with the employees as the beneficiaries. As such the employees, in our view, were also entitled to claim the monies back from CNLT as they were part of the employees' salary and belonged to the employees. Since the employees were entitled to receive those monies, the employees were necessarily creditors of CNLT. As creditors, they were entitled to bring an action under s. 304 of the Act.

[73] The definition of "creditor" is given under s. 217(1)(b) of the Act to include "contingent and prospective creditors of a company". In *Premium Vegetable Palm Oils Bhd*, the High Court observed as follows:

[17] The court is of the view that the word 'creditor' as being used in s. 304 should be interpreted in the widest sense and that it includes all persons having pecuniary claims against the company, (in this respect the first defendant) and the creditor should be a person who could enforce its claim against the company by an action of debt and need not establish a finding of liability before becoming a creditor.

[18] In *Emporium Jaya (Bentong) Sdn Bhd (In liquidation) v. Emporium Jaya (Jerantut) Sdn Bhd* [2002] 1 MLJ 182, the court held at p 193:

> The word 'creditor' is not defined in detail under the Act. Section 217(1)(b) of the Act only mentions any creditor, including a contingent or prospective creditor, of the company. In the popular meaning of the word, 'creditor is a person or company to show money is owing. Zakaria Yatim J in *Jurupakat*'s case has said that a 'creditor is a person who could enforce his claim against the company by an action of debt'. The claim or debt in question must not be in the form of unliquidated damages (see *Penington's Company Law* (1985) 5th edition, p 843). When we talk about 'contingent creditor', it simply means that a person who could enforce his claim by an action of debt whether the claim or the right to enforce such claim can be anticipated to arise if a particular event occurs. The words 'prospective creditor' refer to a creditor whose claim for debt or right to enforce such claim is expected or likely to happen in the future.

[19] Section 217 of the Companies Act 1965 provides that a 'creditor' includes a 'contingent or prospective creditor'. The word 'prospective creditor' refers to a creditor whose claim for debt or right to enforce such claim is expected or likely to happen in the future. That being the case, the court is of the view that the plaintiff comes within the ambit of 'prospective creditor' for it to commence the present action against all the defendants. The issues whether the plaintiff succeeds or not at the end of the case is immaterial at the commencement stage.

[20] On the general rule of construction of statutes, that the same term or expression used in different part of a statute must be accorded the same meaning unless the context otherwise requires. Therefore, the terms 'creditor' in s. 304 must be taken to also mean to include 'contingent or prospective creditor' as being used in s. 217(1)(b) of the same Companies Act 1965.

[21] The above finding is supported by *Halsbury Laws of England*, para 1530 – where the term 'creditor' is defined as 'every person having a pecuniary claim against the company, where actual or contingent.'

[22] In *Ganda Holdings Bhd v. Pamaron Holdings Sdn Bhd* [1989] 1 MSCLC 90.286, the court has also held:

> ... by reason of the buyer's default in performance of the agreement, the order was converted into a money judgment. The fact that the seller was entitled to damages from the buyer had changed the status of the seller to that of a creditor.

[23] The above authorities clearly say that a plaintiff who has a pecuniary claim against the company is a 'prospective creditor' to the company and by virtue of the definition in s. 217 of Companies Act 1965, is also a 'creditor' for the purpose of winding up process of the company including for the purpose of s. 304 of the Act. Being a creditor (or prospective creditor) the plaintiff has the necessary *locus standi* to institute an action against the fourth defendant under s. 304(1) of the Companies Act 1965.

[74] In *R v. Kemp* [1988] 1 QB 645 the word "creditors" was construed to include "potential creditors".

[75] We agree with the view that the word "creditor" in s. 304 of the Act must be taken to also include "contingent or prospective creditor" as being used in s. 217(b) of the Act and the word "prospective creditor" refers to a creditor whose claim for debt or right to enforce such claim is expected or likely to happen in future.

[76] On the facts of this case, the employees became the creditors of CNLT by September 2007 when CNLT failed to remit the employees' statutory contribution for the month of August 2007.

[77] It is important to determine when a person becomes a creditor for the purpose of s. 304 of the Act. This is because a cause of action grounded on the said section is available only to a person who is a creditor and who has been defrauded as such.

[78] In *Re Gerald Cooper Chemicals Ltd*, Templeman J made the following observation at p. 53 of the report:

> In my judgment, when Mr Cooper on behalf of the Cooper company sought from Harrisons an order for indigo on advance payment terms, Mr Cooper was carrying on the business of the Cooper company. When the Cooper company accepted the advance payment of £125,698 odd, Mr Cooper knowing that there was no prospect, or no reasonable prospect or intention of supplying indigo, and no intention of returning the money to Harrisons, the business of the Cooper company was carried on fraudulently. The subsequent payment to Jimlou of £110,000 made the fraudulent carrying on of the business irremediable and constituted a fraud on the then creditor, Harrisons. The whole transaction between the Cooper company and Harrisons constituted the carrying on of the business of the Cooper company with intent to defraud a creditor of the company. Save that only one creditor was involved, the situation appears to meet the requirements of s. 332 set forth by Oliver J in *Re Murray-Watson Ltd* to which I have already referred, namely that the section is contemplating a state of facts in which the intent of the person carrying on the business is that the consequence of carrying it on (whether because of the way it is carried on or for any other reason) will be that creditors will be defrauded; 'intent', of course, being used in the sense that a man must be taken to intend the natural or foreseen consequences of his act.
>
> …
>
> In the present case, the Cooper company was carrying on the business of selling indigo. In my judgment, they carried on that business with intent to defraud creditors if they accepted deposits knowing that they could not supply the indigo and were insolvent. They were carrying on business with intent to defraud creditors as soon as they accepted one deposit knowing

that they could not supply the indigo and would not repay the deposit. It does not matter for the purposes of s 332 that only one creditor was defrauded, and by one transaction, provided that the transaction can properly be described as a fraud on a creditor perpetrated in the course of carrying on business. If the Cooper company had fraudulently supplied sub-standard indigo to Harrisons, the Cooper would have committed a fraud on a customer, but by accepting a deposit knowing that they could not or would not supply indigo, and by using the deposit in a way which made it impossible for them to repay Harrisons, the Cooper company, in my judgment, committed a fraud on a creditor.

[79] Justice Templeman's analysis in *Re Gerald Cooper Chemicals Ltd* was accepted by the English Court of Appeal in *Morphitis v. Bernasconi and Others*. Chadwick LJ, in delivering the judgment of the court, made it clear that only events after the fraudulent misrepresentation, should be taken into account in determining whether any business of the company was carried out with intent to defraud creditors. At pp. 70-74 of the report His Lordship stated:

[41] The question for the judge, in the light of his finding that Mr Monti and Mr Bernasconi intended to mislead Ramac on 12 November 1993 (and thereafter) by promising a payment of £10,000 on 23 December 1993 which they knew would not be made, was whether, from 12 November 1993, 'any business of the company was carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose': see s. 213(1) of the 1986 Act…

…

[48] In my view it is impossible to reach the conclusion, on the facts found by the judge in the present case, that the business of the company was carried on after 12 November 1993 (but not before) with intent to defraud creditors – or, in particular, with intent to defraud a single creditor, Ramac. The business of the company was carried on throughout 1993 (as well before as after 12 November) with intent to protect Mr Monti and Mr Bernasconi (as former directors) from the penalties to which they would otherwise be exposed under s. 216 of the 1986 Act as directors of Newco. It was inherent in counsel's scheme that, when the company did go into insolvent liquidation (as it was intended that it would at the end of the 12-month period). Ramac would be an unpaid creditor. The liquidator does not suggest that the carrying on of the business of the company with the intent to protect the former directors from penalties under s. 216 of the Act – and with the knowledge that, on liquidation, Ramac would be an unpaid creditor – is, of itself, sufficient to engage s. 213 of the Act. The only matter relied on is the promise, in the letter of 12 November 1993, that Ramac would be paid an instalment of outstanding rent at the end of December. The promise was intended to mislead; in the sense that it was intended to persuade Ramac that its interests were best served by no taking proceedings (including the presentation of a winding-up petition)

A to enforce the debt which it was then owed. But it has not been shown that, by carrying on of the business of the company during the period that Ramac was so misled, Mr Monti and Mr Bernasconi intended to defraud Ramac; or, indeed, that the carrying on of the business of the company did defraud Ramac, in the sense that Ramac's claim as a creditor in the liquidation was prejudiced by the carrying on of the business between
B 12 November 1993 (when, but for the misleading promise, Ramac might have presented a petition) and 23 December 1993 (when the promised payment was not forthcoming).

[49] For those reasons, I would hold that fraudulent trading within s 213 of the 1986 Act has not been made out in the present case; and would
C allow the cross-appeal on that ground.

[80] It could be clearly seen from the evidence adduced in the trial that four out of eight allegations of fact made by the employees occurred in or after September 2007.

D **[81]** The first was the unauthorised payment made out of CNLT's assets during the period when the restraining order dated 26 October 2007 was in place. On 21 January 2008, a payment of RM50,104 was made from CNLT's monies to the appellant. This was during the period when the restraining order was in place and no order of court validating such payment was procured. In her judgment, the learned trial judge held that this provided
E evidence of the appellant's dissipation of assets belonging to CNLT.

[82] The second was the issuance of three cash cheques in a total sum of RM160,000 dated 11 September 2007 and were encashed on 12 September 2007 notwithstanding that an order for the appointment of provisional liquidators dated 6 September 2007 was served on CNLT on 12 September
F 2007. These cheques were issued and encashed by the seventh defendant, the Human Resource Director. From the evidence, the learned trial judge found that they were advances to the seventh defendant and they were approved by the appellant.

G **[83]** From these payments, the learned trial judge held that this amounted to siphoning out a sum of RM160,000 which would have been available to the unsecured creditors or the employees if it had not been dissipated in this manner.

[84] The third was the failure of CNLT to remit contributions to EPF and
H SOCSO and to make payment to IRB despite deductions having been made. The learned trial judge held that the failure to remit these statutory payments from August 2007 when considered in the context of other payments, amounted to a deliberate omission, with dishonest intention of channelling those funds out of CNLT in favour of preferred unsecured creditors and
I shareholders.

[85] The fourth was the dissipation of assets out of the reach of the provisional liquidators in May 2008. From the evidence adduced at the trial, it was established that after the service of the order appointing provisional liquidators for the second time was served on the appellant and CNLT on 2 May 2008, the appellant, on 3 May 2008, issued letters to Global Tradewell Pte Ltd. In these letters, the appellant made reference to stocks of material which he had disclosed in the statement of affairs as stocks belonging to CNLT. There was also an invoice amounting to RM201,000.

[86] These stocks of materials were however not stored in CNLT's premises. They had been removed from the company premises to some other warehouse on 3 May 2008. When the provisional liquidators asked the appellant where these stocks were warehoused, they received no answer from him.

[87] An email dated 18 July 2008 was sent by the appellant to Global Tradewell Pte Ltd. In the said email, the appellant *inter alia* wrote "… I moved the goods so that it is not easily in reach of the provisional liquidators so far it is working well …". The provisional liquidators managed to recover these raw materials from the warehouse managed by U-Top, a company belonging to a person who also owned Global Tradewell Pte Ltd.

[88] In her judgment, the learned trial judge found that this allegation was also made out against the appellant. In her view, the appellant deliberately sought to dissipate assets even after the appointment of the provisional liquidators.

[89] The next issue was the appellant's contention that for a claim under s. 304 of the Act, the statement of claim must specifically identify how the business of the company was carried out with the intent to defraud creditors. The statement of claim must with precision and detail, disclosed the plan or scheme used to defraud the creditors.

[90] This issue had been considered and dealt with by the Court of Appeal. The Court of Appeal was of the view that it was not necessary to establish a scheme to defraud on the part of the appellant to trigger the invocation of s. 304 of the Act. The Court of Appeal opined that the wordings of s. 304 of the Act do not lend itself to be read in such a manner. It was of the view that a single act of doing business to defraud a creditor would be sufficient to trigger an action for compensation against the errant person in his personal capacity. In support of that proposition, the Court of Appeal cited the case of *Siow Yoon Keong v. H Rosen Engineering BV* [2003] 4 CLJ 68; [2003] 4 MLJ 569, which is also the decision of the Court of Appeal.

[91] We agree with the decision of the Court of Appeal on this issue. In fact, the courts in *Re Gerald Cooper Chemicals Ltd* and *Morphitis v. Bernasconi and Others* held that a business may be found to have been carried on with intent to defraud creditors notwithstanding that only one creditor is shown to have been defrauded, and by a single transaction. In *Morphitis* at p. 73 of the report, Chadwick LJ said:

> [46] For my part, I would accept that a business may be found to have been carried on with intent to defraud creditors notwithstanding that only one creditor is shown to have been defrauded, and by a single transaction. The *Cooper Chemicals* case is an example of such a case. But, if (which I doubt) Templeman J intended to suggest that, whenever a fraud on a creditor is perpetrated in the course of carrying on business, it must necessarily follow that the business is being carried on with intent to defraud creditors, I think he went too far. It is important to keep in mind that the pre-condition for the exercise of the court's powers under s. 332(1) of the 1948 Act – as under s. 213 of the 1986 Act – was that it should appear to the court 'that any business of the company has been carried on with intent to defraud creditors of the company'. Parliament did not provide that the powers under those sections might be exercisable whenever it appeared to the court 'that any creditor of the company has been defrauded in the course of carrying on the business of the company'. And, to my mind, there are good reasons why it did not enact the sections in those terms.

[92] In her judgment, the learned trial judge found that the business of CNLT was carried on with intent to defraud the employees as creditors. The learned trial judge, *inter alia*, held:

> (j) When Sahgal's conduct above is coupled with the treatment of the employees in 2008 it becomes apparent that the issuance of memoranda in April and May 2008 amounted to a deception on the employees/ creditors to the effect that they would receive their remuneration and benefits in full, when Sahgal knew full well and understood that there was no likelihood of the employees being paid, *albeit* partially or in full. This is borne out by the fact that operations in the factory had ceased. The services of these employees could have been terminated at that juncture, but were not. A termination of the services of these employees would have attracted considerable compensation payable by CNLT to them, in terms of notice, arrears of salary and termination benefits.
>
> (k) Such a deliberate retention of the employees' services under the deception that CNLT remained a going concern which would require their services in the near future was effected primarily to avoid payment of the requisite compensation that accompanies a cessation of operations. Sahgal was well aware of the emoluments due and payable to the employees as borne out in the various Statements of Affairs filed by him upon the appointment of Provisional Liquidators. It therefore appears to this Court,

upon an application of a high standard of proof approximating that of beyond reasonable doubt that Sahgal's conduct amounts to 'fraudulent trading' as envisaged under section 304. The plaintiffs are therefore entitled to a declaration that Sahgal carried on the business of CNLT with an intention to defraud them as creditors and as such is personally responsible for the debts due and owing to them in the sum of RM2.9 million.

(l) For clarity I state the said declaration is only made against the First Defendant, Sahgal but not against any of the remaining directors.

[93] As at 23 April 2008, there was cash of RM155,134 in the bank account of CNLT, whilst outstanding owing to the employees was around RM1,440,154. The appellant and CNLT continued to carry on business and to incur debts at a time when there was to their knowledge no reasonable prospect of the employees ever receiving payment of their salary or their statutory contribution.

[94] On the facts of the case, we agreed with the findings of the courts below that fraudulent trading within s. 304 of the Act had been made out and the appellant was liable to the employees.

[95] For the foregoing reasons, the appeal was dismissed with costs.